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In the Supreme Court of the United States

OCTOBER TERM, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, ET AL., PETITIONERS

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The Metropolitan Washington Airports Act of 1986 (49 U.S.C. App. 2451 *et seq.*) requires, as a condition of leasing federally owned airports to a regional Airports Authority established by the Commonwealth of Virginia and the District of Columbia, that the Airports Authority create and appoint a Board of Review that has veto power over major Authority actions, and that consists entirely of Members of Congress.

The questions presented are:

1. Whether a challenge to the Board of Review's veto power is justiciable.
2. Whether the Board of Review is constitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 917 F.2d 48. The opinion of the district court (Pet. App. 29a-55a) is reported at 718 F. Supp. 974.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1990. The judgment was stayed by order of the court of appeals on December 6, 1990. Pet. App. 28a. This Court granted a petition for a writ of certiorari on January 14, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Washington National Airport (National) and Washington Dulles International Airport (Dulles) are the only federally owned, major-air-carrier airports in the United States. From the time they were opened until 1987, both airports were operated by the federal government. For many years before 1987, the government had considered ceding its operational control of these airports. Pet. App. 2a.

In December 1984, a federal advisory commission report suggested a long-term lease arrangement between the federal government and an independent regional airports authority. Pet. App. 2a-3a. In response, both Virginia and the District of Columbia enacted legislation authorizing the creation of a regional airports authority capable of assuming the operation of the two airports. See 1985 Va. Acts ch. 598; District of Columbia Regional Airports Authority Act of 1985, 1985 D.C. Law 6-67, *reprinted at* Pet. App. 87a-106a, 119a-139a.

In 1986, Congress passed the Metropolitan Washington Airports Act of 1986 (the Airports Act), 49 U.S.C. App. 2451-2461, *reprinted at* Pet. App. 60a-85a, which authorizes the Secretary of Transportation to transfer operating authority over National and Dulles Airports to a local regional authority (referred to in the statute as "the Metropolitan Washington Airports Authority" and "the Airports Authority") under an extendable 50-year lease. 49 U.S.C. App. 2453(2), 2454(a), 2459. In its statutory findings, Congress recognized, among other things, that all other major-air-carrier airports in the United States are operated by state, regional, or local authorities; that the Executive Branch had recommended a transfer of authority to a "local/

State" entity; and that, in its view, control of National and Dulles Airports by a regional authority would facilitate timely improvements needed to meet growing demand. 49 U.S.C. App. 2451(4), (5) and (7).

Congress included several conditions on the authority of the Secretary of Transportation to enter into a lease of the two airports with the Airports Authority. 49 U.S.C. App. 2454(a)-(c), 2456. The Airports Authority must have powers granted to it by Virginia and the District of Columbia, but must be an independent political subdivision constituted solely to operate the local airports. 49 U.S.C. App. 2456(a) and (b). The Airports Authority must also have a governing Board of Directors composed of 11 members—five chosen by the Governor of Virginia, three chosen by the Mayor of the District of Columbia, two chosen by the Governor of Maryland, and one chosen by the President (49 U.S.C. App. 2456(e)); all but the Presidential appointee must reside in the District of Columbia metropolitan area. 49 U.S.C. App. 2456(e)(2)(C). The lease itself must require an annual payment equal to $3 million in 1987 dollars to the United States Treasury by the Airports Authority. 49 U.S.C. App. 2454(b)(1).[1] The Airports Act also requires that, in order for the Secretary to have authority to enter into the lease with the Airports Authority, the Airports Authority must establish a Board of Review composed entirely of Members of Congress. The Board of Review is to be appointed by the Authority's Board of Directors from lists of Members of Congress serving on specified committees of the Senate and the House of Rep-

[1] The $3 million in 1987 dollars is "computed using the GNP Price Deflator." 49 U.S.C. App. 2454(b)(1).

resentatives, and one Member at large from either body alternately. 49 U.S.C. App. 2456(f).[2] These lists are to be submitted to the Board of Directors by the Speaker of the House and the President *pro tempore* of the Senate. The members of the Board of Review are appointed and serve "in their individual capacities, as representatives of users of [National and Dulles]." 49 U.S.C. App. 2456(f)(1). Members of Congress from Virginia, Maryland, and the District of Columbia are disqualified from serving on the Board of Review. *Ibid.*

Under the statutory conditions for the lease, the Airports Authority must submit five types of actions to the Board of Review for possible veto: (1) adoption of the Authority's annual budget; (2) authorization for the issuance of bonds; (3) adoption, amendment, or repeal of regulations; (4) adoption or revision of any airport master plan; and (5) appointment of a chief executive officer. 49 U.S.C. App. 2456(f)(4)(B). These proposed actions may be implemented by the Airports Authority if not disapproved within 30 days by the Board of Review (or 60 days in the case of the annual budget). If the Board of Review disapproves an action, the action shall not take effect. 49 U.S.C. App. 2456(f)(4)(C) and (D). If the Board of Review is barred from carrying out its functions as a result of a judicial order, the Airports Authority lacks power to take

[2] The Board of Review is to consist of nine members—two each from (1) the House Public Works and Transportation Committee; (2) the House Appropriations Committee; (3) the Senate Commerce, Science, and Transportation Committee; and (4) the Senate Appropriations Committee; and one at large from either body on an alternating basis. 49 U.S.C. App. 2456(f)(1).

any of the actions that it would otherwise be required to submit for review. 49 U.S.C. App. 2456(h).

Before passing the Airports Act, Congress consulted with the Department of Justice regarding the constitutional validity of several proposed bills. See J.A. 25-35. The Department analyzed various proposals and concluded that, although "the issue [was] not free from doubt," one proposed bill would "withstand constitutional scrutiny." J.A. 35. The version enacted by Congress and signed by the President closely resembles that bill.

2. In March 1987, the Secretary of Transportation signed a lease transferring control of the airports to the Airports Authority; the lease was also signed by the Chairman of the Airports Authority, the Governor of Virginia, and the Mayor of the District of Columbia, and took effect on June 7, 1987. Pet. App. 163a-189a. The lease provided for the operation of a Board of Review, as described in the Airports Act. *Id.* at 175a-178a.

Two days after the lease was signed, the Airports Authority adopted bylaws to govern its activities. Pet. App. 148a-162a. Article IV of the bylaws establishes a Board of Review and describes its powers and functions, which are consistent with the provisions in the Airports Act. *Id.* at 151a-154a.

In early April 1987, Virginia amended its prior legislation concerning the Airports Authority in several respects, including an amendment providing explicit power for the Authority to establish a Board of Review. See 1987 Va. Acts ch. 665, § 5.5, *reprinted at* Pet. App. 111a. In June 1987, the District of Columbia similarly amended its earlier legislation in several respects, and, in one of these amendments, also empowered the Airports Authority to establish a Board of Review. See District of Columbia Re-

gional Airports Authority Act of 1985 Amendment Act of 1987, D.C. Law 7-18, § 3(c)(2), *reprinted at* Pet. App. 143a.

By September 1987, the Airports Authority had created and appointed the Board of Review. Pet. App. 6a.

3. In March 1988, the Airports Authority submitted to the Board of Review a new Master Plan for National Airport. The Board of Review voted the following month not to disapprove it, and the Airports Authority has begun implementation of the Plan. The Master Plan provides for construction at National Airport which will, among other effects, make it possible for the airport to accommodate larger aircraft. The size of the terminals and parking facilities will also be significantly expanded. Pet. App. 6a, 36a, 41a.

4. In November 1988, respondents Citizens for the Abatement of Aircraft Noise, Inc. (CAAN), and two individual members of CAAN filed this action against petitioners (the Airports Authority and the Board of Review). Respondents[3] alleged that the Master Plan was "now causing injuries to CAAN and its members because of increases in noise levels and safety and environmental problems at National Airport and is likely to cause increasing injuries to them in the future." J.A. 10. Respondents further alleged that the Board of Review's power to disapprove Authority actions violates several constitutional provisions and the separation of powers doctrine. *Ibid.* They therefore sought a declaratory judgment that the Board of Review's authority "under 49 U.S.C.

[3] Although the United States, which intervened in the court of appeals, is a respondent pursuant to Sup. Ct. Rule 12.4, references in this brief to respondents are to CAAN and the two individual plaintiffs.

§ 2456(f)(4)" is unconstitutional and void, and an injunction preventing the Board from exercising its review authority and taking any other actions under the Act; they also sought a declaratory judgment that the Airports Authority is forbidden to implement any actions required to be submitted to the Board, and an injunction preventing the Airports Authority from implementing the Master Plan for National Airport. J.A. 10.

5. In July 1989, the district court granted summary judgment to petitioners, upholding the validity of the Airports Authority structure. Pet. App. 55a.

The district court first ruled that this case is ripe, despite the fact that the Board of Review's veto authority had not been exercised with respect to the Master Plan. Pet. App. 37a-39a.[4] The court also concluded that respondents have standing because an increase in air traffic at National Airport could not occur without the improvements provided for by the Master Plan. *Id.* at 39a-42a. Alternatively, the court found standing because respondents' influence over decisions regarding National Airport has been diminished by the ban against local representation among the Members of Congress on the Board of Review. *Id.* at 42a-43a.[5]

Turning to the merits, the district court first rejected the contention that the Board of Review is

[4] The Board of Review has exercised its veto power once, on an unrelated matter (a proposal concerning the Dulles Access Road). Pet. App. 38a; J.A. 83-84, 91-92.

[5] The court also rejected petitioners' claim that respondents should be required to exhaust their administrative remedies because respondents were participants in an ongoing study of noise problems being conducted by the Authority. Pet. App. 39a.

merely "an arm" or "an agent" of Congress. The court noted that the Airports Authority appoints the members of the Board of Review and can remove them; that the Board of Review members serve in their individual capacities as representatives of users of the airports (49 U.S.C. App. 2456(f)(1)); and that, in order for the Secretary to enter into a lease, the Airports Authority must be independent of the federal government as well as Virginia and the District of Columbia. It concluded that the Board of Review is therefore not an agent of Congress for federal separation of powers purposes. Pet. App. 46a-50a.

The district court further rejected the claim that the Board of Review was "mandated" by federal law. The court emphasized that both Virginia and the District of Columbia voluntarily created the Airports Authority and entered into the lease with the federal government. Pet. App. 50a-51a. Accordingly, the Board of Review "derives its existence from state law, not federal law." *Ibid.* The court thus concluded that, in view of the state law character of the Airports Authority and its Board of Review, there is no conflict with constitutional requirements for federal offices and the exercise of federal power. *Id.* at 51a-54a.

6. Respondents appealed, and, pursuant to 28 U.S.C. 2403(a), the Attorney General intervened on behalf of the United States to defend the statutory scheme. A divided panel of the District of Columbia Circuit reversed the judgment of the district court and concluded that the Board of Review is unconstitutional.

The court first concluded that respondents' claims are justiciable. Pet. App. 8a-9a. Finding that the

issue "warrant[s] little discussion," it agreed that the case is ripe. *Id.* at 9a.[6] The court then determined that respondents' allegations of injury from noise, air pollution, and risk of injury are "'fairly traceable'" to the Master Plan, which would provide for a "significant increase in air traffic." *Ibid.* The court thus found it unnecessary to address the district court's alternative basis for standing. *Ibid.*

On the merits, the majority first rejected the argument that the Board of Review is not exercising federal power. The court emphasized that the authorizing statutes of Virginia and the District of Columbia do not spell out the powers and functions of the Board of Review in detail; instead, the federal Airports Act contains specific requirements concerning the Board. Pet. App. 10a-13a. The court concluded that the Board thus carries out "'significant authority pursuant to the laws of the United States'" (Pet. App. 10a, quoting *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976)), because the federal statute defines the character of the Board of Review. Pet. App. 10a-11a.

Having determined that federal power is being exercised, the court of appeals held that the Board of Review is unconstitutional on general separation of powers grounds. It concluded that the members of the Board of Review are implementing executive functions and are subject to congressional control. Pet. App. 15a-19a. Contrary to the district court's analysis, the court also emphasized that, in its view, Congress retains removal power over the members of the Board of Review because it can remove Members of Congress from the pertinent congressional commit-

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[6] The court also summarily agreed that respondents were not required to exhaust administrative remedies. Pet. App. 9a.

tees, thereby making them ineligible for continued service on the Board. *Id.* at 18a.[7]

Judge Mikva dissented. He questioned the court's characterization of the Board as a federal entity and concluded that "[t]he fact that the federal Act authorizing the transfer of the airports to the Authority contemplates the Board's creation does not alter the Board's fundamental state parentage." Pet. App. 22a. Judge Mikva then concluded that, even if the entity is exercising federal power, it is not unconstitutional. *Id.* at 22a-26a. Judge Mikva also disagreed with the majority's removal analysis. He concluded that the Airports Act should be read to vest removal authority over Board of Review members with the Airports Authority Board of Directors both because the appointment authority lies with the Airports Authority Board of Directors, and because statutes should be construed to avoid constitutional problems. *Id.* at 24a-26a.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a novel and difficult issue—the validity of a federal lease condition, readily accepted by state authorities, requiring the appointment of Members of Congress to a state-created entity. Although we believe that such a condition would in most instances be unconstitutional, we conclude that it is permissible in the unusual circumstances at issue here.

1. The question of justiciability in this case raises issues of both standing and ripeness. Although these

[7] Despite its holding, the court directed that "actions taken by the Board to this date not be invalidated automatically on the basis of our decision." Pet. App. 19a (citing *Buckley* v. *Valeo*, 424 U.S. at 142).

issues are not free from difficulty, we believe that respondents' claims are justiciable.

On the issue of standing, respondents claim that they suffer from various harmful effects of air and ground traffic at National Airport, that the Master Plan will aggravate these injuries by increasing traffic at National, and that invalidation of the Board of Review would remedy this injury by preventing implementation of the Master Plan. To some extent, respondents' claims of injury are speculative and attenuated because increased airport traffic is also dependent on decisions by other actors, including commercial airlines and the Federal Aviation Administration (FAA). Nevertheless, the Master Plan includes specific changes that will facilitate increases in the number of passengers and of flights, and respondents have therefore alleged a sufficient injury, which is traceable to the Master Plan and subject to judicial remedy.

On the issue of ripeness, we believe that this matter is ripe for judicial review even though the Board of Review did not veto the Master Plan and it is the veto authority that respondents have challenged. Precedents from this Court teach that, even when a power to remove or disapprove has not been exercised, the validity of such a provision may be ripe for judicial resolution if, as here, the very existence of the power has an immediate impact. In this case, moreover, the Board of Review completed its review procedure with respect to its decision not to veto the Master Plan, and nothing further remains to be done with respect to that procedure. Therefore, respondents' challenge to the Board of Review's authority is ripe.

2. With regard to the merits, it is clear that the Constitution does not prohibit Members of Congress

from holding state offices; the Framers explicitly considered such a prohibition and rejected it. 1 M. Farrand, *The Records of the Federal Convention of 1787* (1937 ed.) 20-21, 386-393, 428-429. But it is also clear that Members of Congress may not hold other federal offices, legislate without bicameralism and presentment to the President, or perform federal executive functions. *Bowsher* v. *Synar*, 478 U.S. 714 (1986); *INS* v. *Chadha*, 462 U.S. 919 (1983).

In the present case, appointment of the Board of Review, which would be permissible if undertaken by a State on its own, is made in response to a federal condition. The federal condition, which would be impermissible if it established a congressional board with veto power over a federal agency, involves not a federal agency but an agency created at the state level by a state entity (which would have the ability to make the appointments on its own).

In most instances, a condition of this kind—requiring a state or local entity to appoint Members of Congress to a state office as a condition of some federal aid or benefit—would violate separation of powers principles because it would pose a substantial threat of congressional aggrandizement and incursion on the Executive Branch. But we believe that, in the unusual circumstances of this case, no such threat exists. In the present case, Members of Congress have special and distinctive interests as individuals. Moreover, the case is one in which the Executive Branch has agreed with the Legislature on the permissibility of the organizational structure under which the airport property has been leased.

a. Contrary to the court of appeals' analysis, the Board of Review exercises state, and not federal, power. A conclusion that the authority is exercising federal power fails to give appropriate weight and

respect to the significance of the independent enactments by Virginia and the District of Columbia; it also raises questions concerning a wide variety of cooperative regimes in which state programs accord with specifications in federal statutes.

That the Board of Review is exercising state authority is necessary, but far from sufficient, to establish the validity of the condition. If existence of state authority were the only requirement, such conditions could be adopted by Congress in many circumstances in which the functions and responsibilities of the Executive Branch would be significantly impaired.

b. In addition to the state character of the challenged authority, this case presents an exceptional circumstance that obviates the threat of significant incursion on the Executive Branch or aggrandizement of legislative power. A rare, and in our view, essential element of the validity of the Board of Review arrangement here is that Members of Congress are not only designated to serve "in their individual capacities," but also do in fact have special and distinctive individual concerns that justify that designation. As a result of their responsibilities, and especially their need to travel to and from their legislative districts, Members of Congress are frequent and regular users of the two airports involved here.

c. The validity of the Board of Review is further supported by two additional circumstances present in this case. First, federal ownership and operation of major-air-carrier airports is an anomaly; all other such airports are operated at the state, regional, or local level. Second, the Executive and Legislative Branches have agreed on the formulation and implementation of the statutory condition of the airports' lease.

ARGUMENT

I. THE CHALLENGE TO THE CONSTITUTIONALITY OF THE BOARD OF REVIEW IS JUSTICIABLE

Although the issues are not free from difficulty, we believe that respondents have standing and that their claims are ripe for judicial resolution.

A. Respondents Have Standing

To have standing, respondents must allege a sufficiently concrete and particularized injury, which is traceable to the challenged actions of petitioners and which can be remedied by the courts. See *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State Inc.*, 454 U.S. 464, 472 (1982).

Respondents' complaint alleges that they suffer from the activity level at National Airport, and that this activity causes noise, safety problems, and air pollution. J.A. 4-5; see also J.A. 85-86. An affidavit by a CAAN director further claims that CAAN members are "adversely affected by the traffic congestion resulting from passenger activity" at National, that some members have "developed health problems that they attribute to the air traffic," and that "others' property values have suffered as a result of their proximity to the airport or its flight path." J.A. 86.

Respondents' complaint alleges further harm from the Master Plan on the ground that it is "now causing injuries to CAAN and its members because of increases in noise levels and safety and environmental problems at National Airport and is likely to cause increasing injuries to them in the future." J.A. 10. Respondents' motion for summary judgment states that their interest arises because "[t]he Airports Authority's master plan proposes to expand National Airport facilities and passenger levels, which, in turn, will cause the noise and other airport problems to worsen." Pltf. Memo. Suppt. Mot. for Summary Judgment 16. The CAAN director's affidavit also maintains that injury will occur because the Master Plan "proposes to expand the airport's facilities, to build them to accommodate wide-bodied jets, to increase passenger levels, and to increase air carrier traffic by utilizing currently unused slots." J.A. 86.

To an extent, the claim of injury is speculative and attenuated because the Plan is a limited one and because increases in activity at National Airport are in part dependent on decisions by others. Although a new terminal is being built, the Master Plan preserves the existing number of aircraft gates. J.A. 89-90. The Plan improves surface traffic flow and parking, but does not change the length, number, or orientation of runways. J.A. 90. Moreover, the Airports Act as well as the lease between the Secretary of Transportation and the Airports Authority provides that the Airports Authority *cannot increase* the number of aircraft operations authorized by FAA regulations on October 18, 1986. See 49 U.S.C. App. 2454(c)(5)(C); Pet. App. 172a; J.A. 90. See also 49 U.S.C. App. 2458(e)(1). (FAA Administrator may not increase the number of takeoffs and landings from that authorized by FAA regulations on October 18, 1986). Furthermore, although some of the authorized flight slots are currently unused, commercial airlines must decide whether to schedule flights for currently unused slots. C.A. App. 170, 314. Finally, decisions on whether to use larger aircraft are also made by the commercial airlines and require FAA approval. J.A. 91.

Thus in some respects, respondents' asserted injuries resulting from the Master Plan are far from certain. This uncertainty places respondents' standing in question. See *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 43-45 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 504-507 (1975).

Yet the Master Plan does call for changes that will facilitate increases in airport traffic. The Plan includes new aircraft gates capable of handling larger aircraft than before. Pet. App. 41a; J.A. 91. It also includes an additional taxiway turnoff to reduce aircraft time on the runway and thereby improve airport capacity. Pet. App. 41a; Pltf. Exh. 16 at 10. The Plan itself anticipates, and proposes changes that will foster, an increase in the number of flights and passengers. See Pet. App. 41a; C.A. App. 170, 314, 330; Pltf. Exh. 16 at 10.

Since respondents' claims of injury from increased traffic at National Airport are in part attributable to the Master Plan, it appears to us that respondents have asserted a sufficiently concrete and personalized injury, traceable to the actions of petitioners. And since the Master Plan could not have been adopted and cannot be implemented without the Board of Review, respondents' injury can be remedied by the relief they seek.[8]

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[8] See 49 U.S.C. App. 2456(h) (if Board of Review is unable to carry out functions by reason of a judicial order, Airports Authority shall have no authority to perform any of the acts required to be submitted to the Board of Review); Pet. App. 154a (Airports Authority bylaws provision to same effect); *id.* at 178a (lease provision to same effect).

B. Respondents' Claim Is Ripe

Ripeness has two dimensions. First, a claim must be sufficiently ripe to meet Article III case or controversy requirements. Second, the ripeness doctrine is also premised on prudential considerations. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). In this case, we believe that the Article III requirements have been met because there is a real conflict between the parties, and the action taken by the petitioners assertedly causing harm to the respondents (the decision not to veto the Master Plan) has already occurred. Thus, the ripeness concerns here are prudential in nature. Although the Board of Review did not exercise its veto authority with respect to the Master Plan, we conclude that respondents' challenge to that authority is nevertheless ripe.

As this Court made clear in *Bowsher* v. *Synar*, 478 U.S. 714, 727 n.5 (1986), the fact that a mechanism for controlling official conduct is not exercised does not necessarily render unripe a dispute regarding that mechanism. *Bowsher* involved a contention that the Comptroller General may not be authorized to carry out executive functions because he is an agent of Congress, and that his status as an agent of Congress was shown in part by a statutory provision making him removable by that body. A question of ripeness was raised, however, because that power of removal had never been exercised (or even threatened). This Court found the case ripe for review because "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." 478 U.S. at 727 n.5 (internal quotation marks

omitted). Thus, the very existence of the removal mechanism was held sufficient to affect the role of the Comptroller General.

Although the threat of removal of an official is not identical to the threat of disapproval of his actions, the logic of *Bowsher* is applicable here. The Board of Review's veto power undoubtedly has an impact on the Airports Authority, whether the power is exercised or not, as the Authority contemplates formulation of the proposals that must be considered by the Board.

Similarly, in *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678 (1987), this Court reached the merits of the severability of a legislative veto provision that had never been used. That provision had not been used because the controversy arose after such devices had been invalidated in *INS* v. *Chadha*, 462 U.S. 919 (1983). Although this Court found it unnecessary to discuss the question of ripeness, the court of appeals had considered the issue and concluded that the matter was ripe. See *Alaska Airlines, Inc.* v. *Donovan*, 766 F.2d 1550, 1556 (D.C. Cir. 1985).[9]

Additionally, the Third Circuit found the controversy ripe for review in *Ameron, Inc.* v. *U.S. Army Corps of Engineers*, 809 F.2d 979, 986-988 (1986), cert. granted, 485 U.S. 958, cert. dismissed, 488 U.S. 918 (1988), in circumstances closely analogous to those here. In *Ameron*, the court reached the merits of a challenge to the Comptroller General's statutory authority to extend the length of an auto-

[9] See also *EEOC* v. *CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984); *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984). But see *Muller Optical Co.* v. *EEOC*, 743 F.2d 380 (6th Cir. 1984).

matic stay of contract implementation by the government following a protest of the award of the contract. The Comptroller General had not exercised the challenged authority; the court nevertheless held the controversy ripe because the Comptroller General's *ability* to exercise the power was found to have an actual impact on the contracting process.

We also note, however, that in *Clark* v. *Valeo*, 431 U.S. 950 (1977), this Court summarily affirmed a decision of the D.C. Circuit, which had found that a challenge to a congressional veto provision was not ripe for review because the veto provision had not been used. *Clark* v. *Valeo*, 559 F.2d 642, 649 (*in banc*). But in *Clark*, the court of appeals went on to point out that the challenge to the legislative veto mechanism arose before Congress's period to exercise its veto power had expired, and Congress had adjourned without acting. In contrast, in this case, Board of Review consideration of the Master Plan, as proposed by the Airports Authority, has been completed.

Thus, we believe the challenge to the Board of Review's veto power is ripe for judicial determination. The analysis set out in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967), supports this conclusion. That analysis focuses on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149.[10] The issue here is "fit for judicial decision" because, in addition to the "here-and-now subservi-

[10] Although *Abbott Laboratories* arose in an administrative law context, it remains the "leading discussion of the doctrine" of ripeness. *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

ence" analysis suggested by *Bowsher*, the Board of Review has taken all necessary steps regarding approval of the Master Plan. The review process is therefore final, making the case concrete. See *Abbott Laboratories*, 387 U.S. at 148-149.

Furthermore, as a result of the imminent implementation of the Master Plan, respondents are threatened with the injuries they allege unless they prevail in this challenge. Thus, we believe the *Abbott Laboratories* standards have been met.

II. THE STATUTORY LEASE CONDITION REQUIRING THE APPOINTMENT OF MEMBERS OF CONGRESS IS CONSTITUTIONAL IN THE UNUSUAL CIRCUMSTANCES OF THIS CASE

Respondents challenge the validity of the Board of Review, claiming that it violates the constitutional separation of powers, as well as the bicameralism requirement (Art. I, §§ 1 and 7), and the Presentment Clauses (Art. I, § 7, Cls. 2, 3). J.A. 10. Respondents also argued below, though they did not allege in their complaint, that service on the Board of Review by Members of Congress is inconsistent with the Appointments Clause (Art. II, § 2, Cl. 2), and the Incompatibility and Ineligibility Clauses (Art. I, § 6, Cl. 2). Pet. App. 19a, 53a-54a.

We agree with respondents that separation of powers principles, as well as the bicameralism and presentment requirements, sharply restrict the manner in which Congress or its agents may act within our constitutional system. Nevertheless, we believe that the Board of Review's authority is constitutional in the special, limited context of this case.

It is clear that a State may, consistently with the Constitution, appoint Members of Congress to state

offices. It is also clear that Members of Congress are precluded by specific provisions of the Constitution from serving on a federal Board of Review that has veto power over the actions of a federal agency or that otherwise exercises federal governmental authority. In the present case, the Airports Authority's Board of Review is created and appointed by the Airports Authority, which is a creature of state and local law, but the federal Airports Act itself specifies that such a Board is a condition for the federal lease.

Although such an arrangement does not violate any specific constitutional prohibition, we believe that, in most circumstances, such a statutory condition would be unconstitutional because it would pose a threat of congressional aggrandizement and of significant intrusion on the functions and responsibilities of the federal Executive Branch. Because of a highly unusual combination of circumstances, however, we conclude that the statutory lease condition at issue here does not pose such a threat and is permissible.

A. States May Appoint Members Of Congress To State Offices

It is undisputed that States may appoint Members of Congress to state offices. Indeed, the Framers specifically considered whether to prohibit Members of Congress from holding state offices, and explicitly decided against such a limitation. Thus, if a State, acting entirely on its own and without federal inducement, appointed Members of Congress to a state Airports Authority, the appointments would be constitutional.

As ratified, the Constitution contains an Incompatibility Clause that bars Members of Congress from

simultaneously holding federal office,[11] and an Ineligibility Clause that prohibits Members of Congress from being appointed to federal offices that were created, or for which the "Emoluments" were increased, during their congressional tenure.[12] Neither Clause prohibits Members of Congress from holding state office.

Introduced at the Constitutional Convention by Edmund Randolph as part of "the Virginia Plan," these provisions originally did include a prohibition against holding state office. See 1 M. Farrand, *The Records of the Federal Convention of 1787* (1966 ed.) 20-21. See generally *Signorelli* v. *Evans*, 637 F.2d 853, 859-862 (2d Cir. 1980). While there was considerable discussion of the aspects of Randolph's proposal prohibiting Members of Congress from holding federal offices, the Framers decisively rejected the prohibition of simultaneous state appointments. Charles Pinckney moved to strike it, and Roger Sherman seconded this proposal, explaining: "It [would] seem that we are erecting a Kingdom at war with itself. The Legislature ought not to be fettered in such a case." 1 M. Farrand, *supra*, at 386. The proposed state office ineligibility provision for Members of the House of Representatives was then defeated by an 8 to 3 vote (*ibid.*), and James Wilson commented: "By

[11] The Incompatibility Clause provides: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Art. I, § 6, Cl. 2.

[12] The Ineligibility Clause provides: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." Art. I, § 6, Cl. 2.

the last vote it appears that the convention have no apprehension of danger of state appointments." *Id.* at 393.[13]

Three days later, a similar proposed state office ineligibility provision for Senators was also rejected, with Pinckney urging that "the States ought not to be barred from the opportunity of calling members of [the Senate] into offices at home. Such a restriction would also discourage the ablest men from going into the Senate." 1 M. Farrand, *supra*, at 428-429. See also 1 W. Benton, *1787: Drafting the United States Constitution* 711, 722, 726-727 (1986).

During the ratification debates, James Madison confirmed the rejection of a prohibition against Members of Congress serving in state offices. In *The Federalist, No. 56*, he defended the proposed House of Representatives against an attack that it would be too small to have adequate knowledge of the interests of its constituents by noting, among other points, that, "[t]he representatives of each State * * * will probably in all cases have been members, and may even at the very time be members, of the State legislature * * *." *The Federalist Papers* 348 (C. Rossiter ed. 1961).

Thus, the text and history of the Constitution make clear that States may appoint Members of Congress to hold state offices. Indeed, the practice of appointing Members of Congress to state positions has continued into modern times.[14]

[13] A previous motion to strike the state ineligibility provision had failed on a 5-4 vote. See 1 M. Farrand, *supra*, at 217; *Signorelli*, 637 F.2d at 861 n.8.

[14] For example, selected Members of Congress serve on the Board of Directors of the Massachusetts Centers of Excellence. See Def. Exh. 9.

B. Members of Congress May Not Hold Other Federal Offices, Exercise Federal Executive Functions, Or Legislate Without Bicameralism And Presentment

In contrast, separation of powers principles sharply constrain the role of Congress and its Members at the federal level. As discussed, under the Ineligibility and Incompatibility Clauses, Members of Congress may not hold other "Office[s] under the United States" simultaneously with congressional office; nor may they be appointed to a "civil Office under the Authority of the United States," which was created or for which "Emoluments" were increased during their congressional tenure. See notes 11 & 12, *supra*. These limitations themselves reflect an important separation of powers principle. See *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986).

More fundamentally, Congress may not exercise the functions of the Executive Branch. "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS* v. *Chadha*, 462 U.S. 919, 951 (1983). Thus, federal executive functions may not be entrusted to an individual over whom Congress retains removal power. *Bowsher*, 478 U.S. at 726-727. The consequences of such an arrangement would be that "Congress in effect * * * retain[s] control over the execution of the Act and * * * intrude[s] into the executive function. The Constitution does not permit such intrusion." *Id.* at 734. Instead, "once Congress makes its choice in enacting legislation, its participation ends." *Id.* at 733. Although Congress has "abundant means to oversee and control its administrative creatures," including "durational limits on authorizations and formal reporting requirements" (*Chadha*, 462 U.S. at 955 n.19), Congress may not itself execute the law. *Id.* at 955; see also *Springer* v. *Philippine Islands*, 277 U.S. 189, 201-202 (1928); *J.W. Hampton Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928).

In exercising its legislative power, moreover, Congress must observe the requirements of bicameralism (Art. I, § 1 and § 7, Cl. 2) and presentment to the President (Art. I, § 7, Cls. 2, 3). These requirements are "integral parts of the constitutional design for the separation of powers." *Chadha*, 462 U.S. at 946. Thus, Congress "may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress." *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring in the judgment). For "[i]f Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade 'the carefully crafted restraints spelled out in the Constitution.'" *Id.* at 755, quoting *Chadha*, 462 U.S. at 959.

As a result, just as it is clear that a State, acting entirely on its own volition, may appoint Members of Congress to a Board of Review, so too it is equally clear that, at the federal level, Congress may not require the appointment of its Members to a Board of Review that holds veto power over the actions of a federal agency or that otherwise exercises federal governmental power. In addition to possible Incompatibility and Ineligibility Clause problems, such a requirement would violate fundamental separation of powers principles because Congress would, through

its Members, be exercising federal executive functions. See *Bowsher*, 478 U.S. at 732-734. Moreover, to the extent that the Members' actions in such a context were viewed as legislative, those actions would also be impermissible because they would be undertaken without bicameralism or presentment. *Chadha*, 462 U.S. at 951-959.

C. Although A Federal Condition That States Appoint Members Of Congress Would Be Impermissible In Most Circumstances, The Condition Is Not Unconstitutional In The Limited Circumstances Of This Case

In our view, a federally imposed condition on a grant or authorization to the States—that States appoint Members of Congress to state offices and thereby exercise state authority—would be unconstitutional in most circumstances. The reason is not that such a requirement would violate the Incompatibility and Ineligibility Clauses; by their terms, those Clauses apply only to offices of the United States. For a similar reason, such a requirement would not violate the requirements of bicameralism and presentment—discharge of the duties of a state office is not an exercise of federal legislative power. Instead, such a condition would, in most circumstances, be unconstitutional because it would allow Members of Congress to evade the "carefully crafted restraints" of the Constitution (*Chadha*, 462 U.S. at 959)—to act in an extra-legislative capacity after enacting a statute, and thereby to threaten the Executive Branch's exclusive responsibility for federal executive functions. Although we believe that a conclusion of unconstitutionality will attend such a condition in most instances, we believe that, in the unusual circumstances of this case, such a conclusion is not warranted.

1. At the outset, we emphasize that the powers of the Airports Authority—and of the Board of Review—derive from state authority. This is a necessary, but far from sufficient, condition for constitutionality.[15] Both Virginia and the District of Columbia have enacted valid statutes authorizing the operations of the Airports Authority and the Board of Review, and, indeed, without those statutes, the Authority and the Board could neither exist nor function. This exercise of sovereign power by Virginia and by the District has an independent stature and should not be minimized. We strongly disagree with the court of appeals' conclusion that the Airports Authority's Board of Review is exercising federal authority. In our view, the court of appeals' analysis unjustifiably denigrates the significance of the independent enactments by Virginia and the District. The state and local governments are neither ciphers nor parrots of the federal government: their legislative enact-

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[15] In *Springer* v. *Philippine Islands*, *supra*, this Court held, on separation of powers grounds, that the Philippines legislature could not participate in management of government corporations even if the management were viewed as a proprietary act (277 U.S. at 203); the Court also expressed skepticism about whether Congress could similarly participate in the management of a government corporation on a proprietary rationale (*id.* at 204-205). In that context, however, the Court was considering the activities of the legislative branches (Congress and the Philippines legislature) vis-a-vis the Executive Branch at the same level of government—in other words, the congressional aggrandizement model outlined at pages 24-26, *supra*. That analysis does not directly address the permissibility of such a condition operating at a different level of government (as in this case), and, especially, at a different level of government that clearly has the power to make the challenged appointments on its own.

ments are entitled to weight and respect in evaluating the character of their creations.[16]

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[16] Two complications concerning the state and local character of the Authority should be noted. First, a question arises whether the Airports Authority should be viewed as a creature of state law, since one of its parents is the District of Columbia. The District of Columbia, of course, is not a State under the Constitution. See, *e.g.*, *Hepburn & Dundas* v. *Ellzey*, 6 U.S. 445, 452-453 (1805). Nevertheless, particularly because the District of Columbia currently acts under "home rule" authority (see District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973)), the power that it delegated to the Authority is best seen as comparable to state or local power for purposes of these federal constitutional restrictions. Cf. *Key* v. *Doyle*, 434 U.S. 59, 68 n.13 (1977) (D.C. Code "is a comprehensive set of laws equivalent to those enacted by state and local governments"); *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 110 (1953) (upholding delegation of lawmaking authority to District and analogizing authority conferred to "the police power of a state"); *Metropolitan R.R.* v. *District of Columbia*, 132 U.S. 1, 7-9 (1889) (holding that, under applicable statutes, District is a municipal corporation rather than a department of the United States government); *Hobson* v. *Hansen*, 265 F. Supp. 902, 919-920 (D.D.C. 1967) (three-judge court) (Wright, J., dissenting) (noting that District of Columbia officials are not considered officers of the United States for purposes of the Appointments Clause). Furthermore, the Authority is not simply a creature of the District, but, in very substantial part, a creature of the Commonwealth of Virginia as well.

A second complication is suggested by the holding of this Court that congressional approval of a compact among States converts those States' agreements into "federal law" for purposes of interpreting the compact. *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981). But that principle does not alter the fact that the Airports Authority draws its power from state authority, and is thus itself exercising state power. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 398-400 (1979) (For purposes of 42 U.S.C. 1983, acts of a regional entity created by an interstate compact are under color of state law rather than pursuant to federal law); *Seattle Master Builders Ass'n* v. *Pacific N.W. Elec. Power Co.*, 786 F.2d 1359, 1365 (9th Cir. 1986) (Members of a council implementing an interstate compact need not be appointed pursuant to the Appointments Clause; although congressional consent gives an interstate compact "some attributes of federal law," the "states ultimately empower the Council members to carry out their duties"), cert. denied, 479 U.S. 1059 (1987).

This state character of the Airports Authority bears emphasis. The federal Airports Act itself does not create the Board of Review, just as it does not create the Airports Authority. The federal legislation provides authority for the Secretary of Transportation to enter into a long-term lease arrangement with an Airports Authority established by Virginia and the District of Columbia. The Airports Authority itself was created by legislative acts of Virginia and the District of Columbia, and it is wholly independent of the federal government. See Pet. App. 87a-118a (Virginia legislation); *id.* at 119a-147a (District of Columbia legislation); 49 U.S.C. App. 2456(b)(1). And those jurisdictions amended their previously passed ordinances in order expressly to empower the Airports Authority—which they alone had created—to establish a Board of Review. Pet. App. 111a, 143a. The powers of that Board, in turn, are defined in the Airports Authority's bylaws. *Id.* at 151a-154a. In short, the Airports Authority is clearly created—and the Board of Review is authorized to act—by the enactments of Virginia and the District of Columbia, rather than by the Airports Act.[17]

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[17] Because the Airports Authority and the Board of Review are creatures of state and local law, respondents' Appoint-

The court of appeals' analysis—that the Board of Review is exercising federal authority—also has the potential to create serious problems in a wide range of instances unrelated to this case. As noted, the court concluded that the Board wields federal power because the nature of the Board is spelled out in the Airports Act; as a result, the court concluded, the Board is " 'exercising significant authority pursuant to the laws of the United States.' " Pet. App. 10a. But the fact that a federal statute enumerates requirements, which are then the basis of state or local action, does not transform the state action into federal action. We note that there are numerous federal grant and regulatory programs that operate on a cooperative federalism model and in which state plans must conform to federal requirements. See, *e.g.*, *Wilder* v. *Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2513 (1990) (Medicaid); *International Paper Co* v. *Ouellette*, 479 U.S. 481, 489-490 (1987) (Clean Water Act). Yet it has never been suggested that, in such circumstances, all constitutional provisions governing the federal government's exercise of power (including the Appointments Clause) apply to the state government's implementation of such plans. (Indeed, pursuant to the court of appeals' decision, the Airports Authority itself—not simply the Board of Review—may be " 'exercising significant authority pursuant to the laws of the United States.' ") Under the court of appeals' analysis, significant new questions about the structure and operation of these programs would be raised; the court's analysis of federal authority fails to appreciate the independent validity of the state and local statutes, and should be rejected.[18]

ments, Ineligibility, and Incompatibility Clause objections are unavailing; those provisions relate to offices or officers "of the United States" and "under the United States." See Art. I, § 6, Cl. 2; Art. II, § 2, Cl. 2. See also Pet. App. 53a-54a.

Although the issue is placed in proper perspective by recognizing that the Airports Authority operates pursuant to state law, such recognition serves only to focus the issue, not to resolve it. If the exercise of state authority were sufficient in itself to validate a statutorily imposed condition like the one in this case, a massive loophole in the separation of powers requirement would be opened. For instance, many

[18] Although the existence of congressional power to remove members of the Board of Review might well serve to invalidate the statute, we disagree with the court of appeals' conclusion that the members of the Board of Review are removable by Congress. Pet. App. 18a. The Virginia and District statutes, the Airports Authority bylaws, the Airports Act, and the lease are all silent on the subject of removal; under long-settled principles, if there is silence on removal, the appointing authority retains removal authority. See *Myers* v. *United States*, 272 U.S. 52, 119 (1926); *Carlucci* v. *Doe*, 488 U.S. 93, 99 (1988). The Airports Authority's resolutions appointing members of the Board of Review, moreover, explicitly state that "[t]he terms of each of these appointments are as follows, *except that the Board of Direcors may remove for cause an appointee to the Board of Review prior to the conclusion of this term.*" J.A. 58 (emphasis added); see also J.A. 47. Although the court of appeals rested its conclusion on the fact that Congress could remove a member of the Board of Review from a congressional committee and therefore remove him from the Board of Review, it is more consistent with general principles of removal authority—and with the Airports Authority's own interpretation of its bylaws and authority—to conclude that the Authority retains removal power, and that this power is exclusive. The provisions of the Airports Act relating to membership on the Board of Review, 49 U.S.C. App. 2456(f), are addressed to *appointment*, not to continuing membership or removal.

areas in which the Executive Branch plays an important role in administering cooperative programs with the States could be changed to a structure in which States would be given funds only if they appoint Members of Congress to state offices with veto power over the expenditure of those funds. Federal assistance to state programs for roads, schools, housing, and health care each could be made dependent on state appointment of Members of Congress with veto or other power over major actions, while at the same time leaving no role for the federal Departments of Transportation, Education, Housing and Urban Development, or Health and Human Services. Thus, while the exercise of state authority is essential to the validity of the Board of Review, it represents only the first step in the analysis.[19]

2. An additional, and in our view, essential element present in this case is that, unlike most in-

[19] A related point is the fact that the state and local enactments authorizing the appointment of the Board of Review—and the actions of the Authority and the state and local governments in agreeing to the lease—were entirely uncoerced. But this fact also is a necessary, but not sufficient, condition for validity.

This Court recently reiterated, in considering a condition in a spending program, that, absent undue coercion, a State may protect itself by refusing to accept a federal proposal containing a condition that the State does not like. *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987). See also *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 589-590 (1937). In such a situation, the principal concern is federalism-related, and the self-protection rationale for States has considerable force. But this logic falters when applied to a situation involving separation of powers concerns. Although the States themselves provide their own defense against unwanted federal encroachment, they have no institutional concern in protecting the federal Executive Branch from an incursion by Congress.

stances in which congressional participation might be made a legislative condition, there is here a reasonable basis for the appointment of Members of Congress "in their individual capacities, as representatives of users of [the airports]." 49 U.S.C. App. 2456(a)(1), *reprinted at* Pet. App. 75a. See also Pet. App. 151a (Airports Authority bylaws); *id.* at 175a (lease). Indeed, Members of Congress have a special and distinctive relationship with these airports. This relationship was stressed by Secretary of Transportation Dole in her testimony to Congress as it considered the Airports Act; she noted that "Members of Congress are heavy users of the air transportation system" and that congressional service requires "many trips back to [congressional] districts." *Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 110 (1986).

As individuals, Members of Congress whose districts are not near the seat of government, and who must frequently commute between the capital and their constituencies, are especially heavy users of National and Dulles airports. (And Members from Virginia, the District of Columbia, and Maryland—who are the least likely to be frequent users—are specifically excluded from the Board of Review. See 49 U.S.C. App. 2456(f)(1).) Thus, these individuals are well suited to represent the interests of all travelers who use these airports.

To be sure, Members of Congress are also users (or potential users) of roads, schools, hospitals, social security, and a myriad of other federally supported programs, but their use of these airports is qualitatively different. At most, Members of Congress are users of these other programs *to the same extent* as

other citizens. Here, in contrast, Members of Congress are individual users of the two Washington-area airports to a far greater degree than most other citizens, and in view of the necessities of their office (involving frequent trips to and from their home districts), this characteristic is predictable and inevitable.

Members of Congress have a special responsibility to travel to and from their districts in order to attend to their legislative duties and at the same time to keep in close touch with the people they represent, and this responsibility underscores their concern with the quality of service afforded by the area's airports. Indeed, the importance of travel to and from legislative sessions is recognized by the Constitution itself, which provides (in Art. I, § 6, Cl. 1) that in the course of such travel, Members shall "in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest."

Furthermore, there is clearly a legitimate interest in guarding against excessive parochialism in favor of local residents at the airports serving the thousands of people who travel to the national capital to visit, to see the national government, and to conduct business; there would, presumably, be no constitutional objection to a non-congressional Board of Review composed of citizen representatives of airport users. Because Members of Congress are frequent individual users of the airports, it is not implausible for them to fulfill that role in this limited context.[20]

[20] As the district court points out, the legislative history contains references to the maintenance of congressional control, sometimes in stark terms. See Pet. App. 49a n.19. As the district court also points out, however, these statements must be seen in perspective, as particular statements in a floor debate and as part of a legislative history that also includes references to the Members of Congress as individual users and as representatives of users. *Id.* at 49a-50a. Particular remarks in the course of a floor debate should not be the basis for invalidating a statute. Unlike language in the statute itself, they do not affect the structural arrangements created by the law, nor do they control the responsibilities and obligations of those implementing the law.

The specification of committee membership for eight of the nine members of the Board of Review may also be seen to undermine the contention that they are appointed as individuals, since the criterion of committee membership is related to congressional duties, rather than to individual use of the airports. Although this aspect of the statutory lease condition is troubling (and was not part of the proposed statute presented to the Justice Department for review, see J.A. 34-35), we do not believe that this requirement of committee membership is sufficient to undermine the individual user rationale. If that rationale is otherwise valid, it is not invalidated by the fact that the Board is largely limited to Members with the greatest transportation expertise.

3. The constitutional validity of the Board of Review is, in our view, further supported by the presence in this case of two additional circumstances: the anomaly of federal operation of major-air-carrier airports, and the agreement of the Executive and Legislative Branches on the organizational structure under which the airport property has been leased.

a. The particular setting of this case—ownership and operation of major-air-carrier airports—is one in which a federal role itself is an anomaly, and the Airports Act explicitly recognizes this anomaly. See 49 U.S.C. App. 2451(5), *reprinted at* Pet. App. 60a; see also Pet. App. 2a. All other major-air-carrier airports in the nation are operated at the state, regional, or local level. As a result, this setting dif-

fers significantly from those in which there is a generally established federal presence.[21]

It might be objected that, just as other States and localities have the authority to own and operate airports without appointing a Board of Review, so too Virginia and the District of Columbia should have that ability. But that objection relates to the federalism concern (whether the condition is an undue invasion of state and local power) rather than the separation of powers concern (whether the condition is an incursion on the Executive Branch). Since the question here is one of separation of powers, the anomaly of any federal role militates against a conclusion that a threat to executive powers is presented by the limited circumstances of the condition under review.[22]

b. Finally, the conclusion that there is no threat of incursion on the Executive Branch is supported by the absence of any conflict between the political branches. Both the Executive and Legislative Branches believe that the Airports Act arrangement is valid. To be sure, the agreement between the Executive and Congress is not dispositive: "The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." *Chadha*, 462 U.S. at 942 n.13. But this Court has stressed that, in such circumstances, the courts are to be at their most deferential. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). See also *Mistretta* v. *United States*, 488 U.S. 361, 384 (1989).

[21] In contrast, the *regulation* of civil aviation has, of course, long been, and remains, a vital federal responsibility. See, *e.g.*, 49 U.S.C. 106 (responsibilities of the FAA). The federal role in the regulation of civil aviation is unaffected by the Airports Act.

[22] See also *Transfer of National and Dulles Airports, Hearings on S. 1017 and S. 1110 Before The Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 2d Sess. 41 (1986) (statement of Secretary Dole) ("Almost since they opened, there has been general agreement that National and Dulles should not be operated as conventional Federal agencies."); 132 Cong. Rec. 32,138 (1986) (Rep. Gingrich) ("[M]anaging legitimately Federal activities is a big enough job. It is time to allow a regional authority to do a regional job, that of managing airports.").

In this case, Congress expressly raised a question with the Executive Branch regarding the constitutionality of the proposed airports legislation, and the Department of Justice responded that it believed the statute would withstand constitutional scrutiny. See J.A. 25-35. Since this is a separation of powers matter in which the two branches directly affected by the legislation have carefully considered the issue and found the statute valid, the Court should be hesitant to strike it down. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (deference to judgment of Congress is "certainly appropriate" when that body has specifically considered the question of the statute's constitutionality). See also *McCulloch* v. *Maryland*, 17 U.S. 316, 401 (1819) ("An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."). Furthermore, the Executive Branch, in the person of the Secretary of Transportation, made an independent decision to sign the lease with the Airports Authority (Pet. App. 186a); the Airports Act authorized, but did not require, the Secretary to enter into such a

lease. See 49 U.S.C. App. 2454(a), *reprinted at* Pet. App. 64a.

* * * * *

We have often argued before this Court the need to vindicate and preserve separation of powers principles. In most circumstances, a congressional condition like the one at issue here would collide with those principles because it would threaten a significant incursion on the Executive Branch. But, given the prerequisites of state authority and lack of coercion, and of the special and distinctive interests of Members of Congress as individuals—combined with the anomaly of a federal role in operating major-air-carrier airports and the specific Executive assent to the challenged provision—service by Members of Congress on the Airports Authority's Board of Review does not violate the Constitution.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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